

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE APPLICATION
OF ROPER CONTRUCTION INC.
FOR AN AIR QUALITY PERMIT
NO. 9295, ALTO CONCRETE BATCH PLANT

AQB 21-57(P)

ORDER DENYING RENEWED MOTION TO DISMISS

THIS MATTER came before the Hearing Officer on the Renewed Motion to Dismiss NSR Source Permit Application and Case No. AQB 21-57(P), filed on December 21, 2021 by The Property Owners of Sonterra (“Movants”), and the Hearing Officer having reviewed the response filed by Roper Construction, Inc. (“Roper”), and Movants’ Reply, and having the benefit of oral argument of counsel for Movants, Roper, and the Bureau on December 15, 2021, and being otherwise fully apprised,

FINDS:

1. The leading case on adequacy of notice is *Nesbit v. City of Albuquerque*, 91 N.M. 455, 1977-NMSC-107. The Supreme Court held that the lack of notice rendered subsequent proceedings void. *Id.* at 457. The Court noted that,

[l]ack of statutory notice is generally held to be a jurisdictional defect which renders the [administrative] action . . . void. However, this rule is tempered somewhat by the fact that New Mexico does not take a strict view regarding compliance with statutory notice requirements. Instead, substantial compliance with the statutory notice provisions would satisfy the purpose of the statute.

Id.

2. Movants do not challenge the content of the notice.

3. Movants’ Renewed Motion urges the Secretary of Environment to dismiss the permit application and the public hearing determination on the basis of thirteen (13) property owners within one-half (1/2) mile of the proposed facility did not receive notice by certified mail, as required by 20.2.72.203.B(1)(b) NMAC.

4. In their timely filed Response, Roper provided affidavits and exhibits to satisfy their evidentiary burden to establish that their agent notified by certified mail all property owners of record as listed on the property tax schedule provided by the Lincoln County Assessor, to wit:

- a. Roper requested a list of property owners of record and a map showing a one-half mile radius.
Roper does not assert that it relied on the online parcel map, as evidenced by Roper's Exhibit 2, an affidavit from the Lincoln County Deputy Assessor.
 - b. Based on the evidence, Roper relied on the Lincoln County Assessor's list when its agent sent notice via certified mail to all recorded property owners.
5. Movants assert that "[t]he procedure [Roper should have used] is straightforward: after receiving the parcel numbers and outdated ownership information from the assessor, the applicant need only input that parcel number into the live website and request the current tax schedule." This argument is rejected because 20.2.72.203.B(1)(b) NMAC does not require an applicant to verify the information received from the local tax assessor, and Movants cite to no caselaw that supports their assertion.
6. The property owners who did not receive notice by certified mail made up approximately 6% of the 190 total parcels (143 distinct owners) within one-half mile of the proposed site. Those omitted property owners were not accurately described by the Lincoln County Assessor for unknown reasons. Seen another way, 94% of the property owners within one-half mile did receive notice by certified mail because of Roper's compliance with the notice requirements.
7. Therefore, it is the finding of the Hearing Officer that on the whole, Roper substantially complied with the notice requirements in 20.2.72.203 NMAC. *See* Exhibit 1, Affidavit of P. Wade.

THE HEARING OFFICER does not find the factual circumstances to warrant a different outcome from the order denying the November 12, 2021 Motion to Dismiss, and therefore finds the renewed motion is not well taken and hereby DENIED.

Gregory Chakalian

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Gregory Chakalian
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Gregory Chakalian, Hearing Officer

Certificate of Service

I hereby certify that on January 18, 2022, A copy of the Order Denying Renewed Motion to Dismiss was sent via electronic mail to the persons listed below. A hard copy will be mailed upon request.

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